(14)

No. 98-1037

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

GEORGE SMITH, Warden, *Petitioner*,

v.

LEE ROBBINS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE OPPOSITION

TO WRIT FOR PETITION OF CERTIORARI *IN FORMA PAUPERIS*

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MOTION FOR LEAVE TO FILE OPPOSITION

TO PETITION FOR WRIT OF CERTIORARI *IN FORMA PAUPERIS*

Pursuant to Supreme Court Rule 39.1, Respondent Lee Robbins hereby respectfully requests leave of this Court to proceed *in forma pauperis*. Robbins is indigent. He has been represented both before the United States District Court and the United States Court of Appeals by Ronald J. Nessim, who was appointed to represent him under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

Pursuant to Supreme Court Rules 15.3 and 39.2, Robbins attaches to this motion his brief in opposition to Smith's petition for a writ of certiorari.

Dated: January 28, 1999 Respectfully submitted,

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CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1875 Century Park East, 23rd Floor, Los Angeles, California 90067-2561.

On January 28, 1999, I served the foregoing document described as **MOTION FOR LEAVE TO FILE OPPOSITION TO PETITION FOR WRIT OF CERTIORARI *IN FORMA PAUPERIS*** on the interested party in this action by placing a true copy thereof in sealed envelopes and arranging for mailing same to the parties listed below:

Carol Frederick Jorstad, Esq.
Deputy Attorney General
300 South Spring Street, Suite 500
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in an office of a member of the bar of this Court at whose direction this service was made, and that I executed this document on January 28, 1999, at Los Angeles, California.

Kathy Coke

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QUESTIONS PRESENTED

1. Did the Ninth Circuit properly find that the no-merit brief filed on direct appeal by appointed counsel for Respondent Lee Robbins was constitutionally defective under *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967)?

2. Should the Ninth Circuit have flouted this Court's mandate in *Penson v. Ohio*, 488 U.S. 75, 109 S. Ct. 346 (1988), which holds that a constitutionally defective *Anders* brief constitutes constructive denial of counsel on appeal?

3. Did the Ninth Circuit correctly find that granting Robbins relief under *Anders* did not violate *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), given that Robbins' conviction became final in 1992, twenty-five years after *Anders* was decided?

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LEE ROBBINS, *Respondent*.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Lee Robbins respectfully requests that this Court deny the petition of George Smith, Warden ("the state"), for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

A. Robbins' State Trial

Lee Robbins was an incarcerated defendant charged with first-degree murder in California. His public defender repeatedly ignored his requests to investigate the case and did not even want to file a discovery motion on his behalf. SER 2-6, 15-17.[1] When Robbins, concerned over his defender's failure to

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1. "CR" refers to the district court docket; "CT" to the clerk's transcript of Robbins' state trial; "ER" to the state's excerpts of record before the Court of Appeals; and "SER" to Robbins' supplemental excerpts of record before the Court of Appeals.

investigate the case, filed a motion for new counsel, his attorney did not present any reasons for his dilatory efforts. Instead, he argued to the court that the evidence against his client was "overwhelming." SER 6. *See People v. Marsden*, 2 Cal.3d 118, 84 Cal.Rptr. 156 (1970) (establishing procedure for requesting new counsel). At a subsequent *Marsden* hearing, the public defender admitted that he still had not given Robbins copies of vital documents and conceded that, since his appointment more than five months before, he had spent no more than four hours discussing the case with Robbins. ER 97, 101-02. In the face this lack of advocacy on his behalf, and the court's unwillingness to appoint new counsel, Robbins had no choice but to defend himself. *See* ER 105, 108; SER 38-39, 50. His decision to do so cannot be said to have been voluntary in any meaningful sense of the word.

Although the court had such strong doubts of Robbins' mental condition that it ordered a competency hearing, it allowed Robbins to waive his constitutional right to counsel. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975); SER 19-20 (court orders a competency hearing when Robbins states that the mental

retardation of the victim's dog is material to his defense); SER 31-49 (*Faretta* hearing). Yet the court informed Robbins that the law library at the county jail would not be of any use to him because other inmates had torn out all of the relevant cases, and told Robbins that this was simply one of the consequences of self-representation – that he could not turn to the court for help. ER 39-40.

The court labeled Robbins' written pretrial motions "garbage." ER 69-70. Yet, although Robbins requested at least five times that the court appoint counsel to assist him, the court refused to appoint either advisory or trial counsel. ER 46-50 (April 16, 1990); ER 37-45 (May 2, 1990); SER 56-59 (motion filed July 6, 1990); SER 62-63 (writ of habeas corpus dated July 13, 1990); ER 60-73 (August 9, 1990). In fact, the court did not even attempt to determine whether Robbins was asking for trial counsel or for advisory counsel, or whether the circumstances warranted the appointment of counsel at all. It simply treated all of Robbins' requests as motions for advisory counsel and denied them on the ground that it would never force an attorney to (in its words) "play second fiddle" to a client. ER 70.

Robbins was indigent and incarcerated and, of course, was without legal training. He had no meaningful opportunity to

investigate or prepare his case. The court granted him only $500 for investigation and denied him promised discovery, including the victim's rap sheet. SER 55 ($500 granted for investigation); SER 58 (motion for additional funds and expert witness); SER 26, 29 (discovery motion, including request for rap sheet); ER 23-24 (prosecutor and court agree that Robbins is entitled to all material sought in his discovery motion); SER 68, 125 (denial of rap sheet).

Exculpatory material, including the County Coroner's official death certificate, established that the victim had died at an hour when the prosecution's own witnesses testified that Robbins was far from the murder site. SER 427-32 (establishing that the victim was shot at 10:00 p.m.); SER 224 (prosecution witnesses and other evidence show that Robbins was far from the crime scene at 10:00 p.m.). Yet this material, which directly contradicted the prosecutor's theory of the case, was not provided to Robbins. SER 433 (prosecutor presents his theory that the victim was shot at 6:30 p.m.); SER 435, ¶ 2 (exculpatory material was not produced to Robbins). The court had assured Robbins that it would serve his seventeen trial subpoenas, including several to police officers, but none of his witnesses was made available, and he was compelled to rest his case without

putting on a defense. ER 55-57; SER 440, ¶ 2; SER 440, ¶ 3; SER 345.

Robbins thus found himself without the funds to hire an investigator, without representation or advice of counsel, without any of the witnesses he had subpoenaed, and without the key exculpatory evidence in the case. The results were, unfortunately, predictable. Robbins declined to hold the prosecutor to an earlier agreement to sever a charge of grand theft auto, did not exercise any challenges during *voir dire*, did not make an opening statement, and never raised any sustainable evidentiary objections. SER 72, 104, 106-16, 130, *and generally*.

As a result, he was tried not only for murder but for fleeing the state afterwards in a stolen truck, and he was judged by a jury that included a man whose police-officer son had often worked with the prosecutor, a woman who had been robbed at gunpoint and whose sister and two brothers-in-law had all been victims of car theft, and a woman who had witnessed an armed robbery and whose son had been beaten so severely during another robbery that his skull was fractured. SER 46-47, 88-89, 98-100,

102.[2] In contrast, the prosecutor apparently excused every black and Hispanic potential juror. CR 1 at 54.

Although Robbins cross-examined the prosecution's witnesses to the best of his ability, his lack of legal training figured prominently in the proceedings. Not only were his attempts to impeach prosecution witnesses inartful, but, more importantly, he failed to introduce evidence that he was in jail on an unrelated misdemeanor at the time when, according to one of the prosecution's witnesses, certain key events allegedly occurred. SER 222-23 (Robbins inquires on cross-examination about a witness' allegedly incestuous relationship with his sister); SER 201-04; SER 362-63; SER 434 (failure to introduce exculpatory evidence). He had no idea how to make a closing statement and was repeatedly hamstrung by the prosecutor's objections during closing. SER 360-66. In upholding one such objection, the court commented on Robbins' exercise of his fifth amendment right to remain silent. SER 365. Needless to say, Robbins never argued

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2. Although California Rule of Court 228.1 required the court to conduct a pre *voir dire* conference, the court failed to do so. *See* CR 1 at 50-53. Had the court conducted such a conference, Robbins might have understood the purpose of *voir dire* and might have exercised his peremptory challenges.

the presumption of innocence or the prosecutor's high burden of proof. SER 360-66.

Robbins' lack of legal training continued to hamper him during the conference on jury instructions. The evidence showed that a gun battle had taken place between the victim and the perpetrator, but when the court asked Robbins whether he wished the jury to be given a manslaughter instruction, Robbins declined, saying, "I am charged with murder and tried with murder." SER 229-32, 320, 335-38. No manslaughter instruction was given. SER 338-45.

Despite all of these hardships, however, the case was a close one. The prosecutor's case rested solely on circumstantial evidence. The jury deliberated for several hours over the course of two days, asked for a read-back of certain testimony, and posed certain questions of the court (which were largely unanswered) before ultimately convicting Robbins of second degree murder. SER 397-402. In so doing, the jury rejected the prosecutor's request for a verdict of first degree murder. SER 359; CT 250.

Contrary to the public defender's pretrial argument to the court, the evidence against Robbins could hardly be characterized as "overwhelming." SER 6. Indeed, it was entirely

circumstantial. There were no eye witnesses to the crime. The gun identified as the murder weapon was recovered from another man who initially tried to hide it from the police. SER 183-84, 189. One of the prosecution's own witnesses testified that he was with Robbins until two hours after the prosecution claimed that the murder had been committed. SER 290-91.

In addition, as noted above, the time of the victim's death, around which the prosecution built its case, was belied by a number of documents, including the County Coroner's official death certificate, which the prosecutor later admitted was never produced to Robbins. *See* SER 427, 433, 437. There were other inconsistencies in the prosecutor's case as well. *See, e.g.*, SER 158, 292-93 (witness, who saw a man near the crime scene at the time that the prosecutor contended victim had died, could not identify Robbins; the clothing worn by the man she saw did not match the clothing that Robbins wore that evening); SER 196, 290 (witness testified that Robbins showed him an alloy and blue gun on the night of murder, but the murder weapon was black); SER 271-72 (inconsistencies between a witness' trial testimony and her initial statements to the police).

Had Robbins been properly represented by counsel, he might well have convinced a jury that there was at least a reasonable

doubt about the identity of the murderer. Because Robbins was acting *in pro per* under the most adverse circumstances, however, he effectively had no chance to put on a competent defense, and was convicted on the basis of inconsistent and relatively weak circumstantial evidence.

B. Robbins' Direct Appeal

Faced with this record, replete with non-frivolous issues, Robbins' appointed appellate counsel, David Goodwin, filed a no-merit brief on direct appeal. Even if such a brief had been appropriate in this case – and it clearly was not – the brief filed by Robbins' counsel was constitutionally defective.

Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), imposes a three-part duty on court-appointed appellate counsel. First, counsel must vigorously argue any non-frivolous issues that can be asserted on the client's behalf. Second, if, after diligently reviewing the file, counsel concludes that no non-frivolous issues exist, he or she should seek to withdraw. Third, counsel must accompany the motion to withdraw with a brief that cites any potentially helpful portions of the record and any legal authorities that might aid the client. The appellate court can then use the brief for guidance when it conducts its own

complete review of the record. 386 U.S. at 744-75, 87 S. Ct. at 1400.

The brief filed on Robbins' behalf failed to satisfy any of *Anders*' requirements. First, Goodwin improperly concluded that the proceedings that led up to Robbins' conviction and sentence were so error-free that no issue deserved briefing. He also violated the second and third prongs of *Anders* by failing to seek to withdraw and by failing to provide the requisite citations either to the record or to helpful legal authorities. He made no effort to direct the appellate court's attention to the pertinent factual issues, or to cite appropriate legal authorities. His brief contained nothing of use to Robbins, his client, and cannot seriously be considered the work of an advocate.

Goodwin's brief was a skimpy eight-and-one-half pages. It consisted of a two-page review of the procedural history of the case that omitted much of the relevant procedural history, a six-page summary of the trial that devoted one or two sentences to the testimony of each witness, and a one-half-page "argument" in which Goodwin merely requested that the court independently review the record for arguable issues. SER 413-24. The brief is devoid of any sign of advocacy.

Goodwin's purported summary of the record did not include any discussion of Robbins' *Marsden* motions, his *Faretta* waiver and his attempts to withdraw it, the court's invitation to Robbins to do what he could with the useless law library at the county jail, the pitiful sum allotted to the investigation of a first-degree murder case, or the court's failure to compel witnesses in Robbins' defense. Goodwin did not include any discussion of the apparent discrepancy regarding the victim's time of death, or the alleged *Brady* violations. He did not even mention the court's last-minute denial of the victim's rap sheet, the court's failure to hold a pre *voir dire* conference, the prosecutor's apparent attempt to secure an all-white jury, or the hearing on Robbins' *Marsden* motion at which the public defender strenuously argued the "overwhelming" evidence against his own client.

Goodwin thus neither drew attention to the facts that arguably supported Robbins' appeal, nor presented even the limited facts in his brief in a manner favorable to his client, nor addressed any of the non-frivolous issues that would have supported Robbins' appeal. He failed to raise <u>any</u> issues on his client's behalf, provided <u>no</u> citations to the record or to legal authorities that would have assisted the court in conducting its

own independent review of the record, and, in fact, cited no legal authorities whatsoever, except for off-handed references to *Marsden* and *People v. Wende*, 25 Cal.3d 436, 158 Cal.Rptr. 839 (1979), a California Supreme Court case that sets out the requirements of *Anders*.

Moreover, although Goodwin's entire "argument" consisted of a request that the court review the record for arguable issues, he failed to supplement the record on appeal to include precisely the portions of the record in which the arguable issues appeared. Thus, the record on appeal did not include transcripts of Robbins' third and fourth *Marsden* hearings, SER 13-25; ER 88-110; the transcript of the hearing on Robbins' first oral motion for advisory counsel, ER 46-50; Robbins' written motion for a continuance and for funds to retain a forensic expert and proceed with his investigation, SER 56-59; Robbins' motion for "advisory counsel, co-counsel or in the alternative counsel," SER 62; the transcript of the colloquy in which the court agreed to serve subpoenas for Robbins, ER 51-59; or the transcript of Robbins' oral motion for trial counsel, ER 60-73. Nor did the appellate record include any evidence relating to the prosecutor's *Brady*

violations, preventing the state court from reaching this issue.[3] This skeletal document certainly did not permit the state court of appeal to conduct a thorough review of the trial record. Robbins effectively had no counsel at trial and none on appeal.[4]

C. **District Court Proceedings**

After exhausting his state remedies, Robbins, acting *in pro per*, filed a habeas petition in federal court. CR 1. After reviewing the briefs, the court appointed counsel to prepare a supplementary brief as to only one issue: whether the no-merit brief filed by Robbins' appellate counsel comported with *Anders v. California*, *supra*, and its progeny. CR 17, 21. After a hearing, the district court granted Robbins' habeas petition on the *Anders* issue alone and ordered the state to either grant

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3. Robbins requested new appellate counsel and, acting on his own behalf, sought to augment the record on appeal. Both of these requests were denied. CR 1, Ex. B-1, B-2. He also submitted a *pro se* brief on his own behalf. CR 25, Ex. 13.

4. Moreover, after Robbins filed his habeas petition, Goodwin voluntarily assisted the state in opposing it. On January 3, 1995, he executed a declaration that the state attached to its supplemental return before the district court, in which he stated that he "attempted to consider" "most" of the issues raised by his client, and "attempted to research" some of them. SER 442. In so doing, Goodwin breached his ethical duty. *See People v. Davis*, 48 Cal.2d 241, 309 P.2d 1 (1957). In any case, his declaration establishes that he did not represent Robbins zealously, or even competently.

Robbins a new trial or release him within thirty days. ER 111-20.

D. **Ninth Circuit Proceedings**

Both parties appealed the district court's ruling. The state contended that Robbins' appointed counsel had filed a constitutionally adequate brief on direct appeal, that Robbins' trial presented no non-frivolous issues, and that the application of *Anders* to Robbins' case violated *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). Robbins cross-appealed, contending that the district court should have considered his claims of trial error as well as his claims of appellate error. The Ninth Circuit denied the state's appeal and granted Robbins' cross-appeal.[5]

It is important to underline the limited scope of the Ninth Circuit's decision. Contrary to the parade of horribles predicted in the state's petition before this Court, the Court of Appeals did not hold that California's no-merit procedure was inadequate. In fact, it endorsed California's procedure, citing extensively and with approval *People v. Wende*, *supra*, and *People v. Feggans*, 67 Cal.2d 444, 62 Cal.Rptr.2d 419 (1967), the two

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5. Robbins' cross-appeal is not at issue here.

California Supreme Court cases that first applied *Anders* to state court proceedings. *See* Petition for Writ of Certiorari ("Petition"), Appendix A, at 8868-69.

The Ninth Circuit's decision was straightforward and fact-specific. All that it held was that the skimpy brief filed in Robbins' behalf on direct appeal did not comply with either *Anders* or with the California cases:

> Our obligation in this habeas action is to determine whether appellate counsel met his obligations under the United States Supreme Court's requirements set forth in *Anders* and its progeny. It is apparent that those requirements were not met.

Petition, Appendix A, at 8869.[6] Not surprisingly, given the age of *Anders* and the relative recency of Robbins' conviction, the appellate court also found that Robbins was not barred by *Teague v. Lane* from challenging under *Anders* the adequacy of his counsel's appellate brief. Petition, Appendix A, at 8872.

SUMMARY OF ARGUMENT

This Court issues writs of certiorari "only for compelling reasons." Supreme Court Rule 10. There is no compelling reason here, and the state does not even claim that any Rule 10

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6. In reaching this conclusion, the Court of Appeals determined that Robbins' trial presented at least two non-frivolous issues. Petition, Appendix A, at 8870-72. The state does not contest this portion of the appellate court's ruling.

consideration exists. The appellate court's decision is fact-driven and does nothing but apply long-standing precedent. It could not be less deserving of this Court's review.

The state's petition is premised on an immense misconception of the scope of the Ninth Circuit's decision. *Robbins v. Smith* does not overturn long-established California procedure. It does not make a single new rule of constitutional law. It simply holds that the no-merit brief filed in this case constituted a denial of due process under both *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and its California progeny. Because Robbins' conviction became final twenty-five years after *Anders* was decided, the decision below also holds that *Anders'* protections may be afforded Robbins without the bar presented by *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). For a petitioner like Robbins, *Anders* could hardly be less of a "new rule" under *Teague*.

The state also argues that this Court should overturn its decision in *Penson v. Ohio*, 488 U.S. 75, 109 S. Ct. 346 (1988), and require habeas petitioners with *Anders* claims to show that they have been prejudiced by their attorneys' deficient briefs. As the Court recognized in *Penson*, however, to do so would be to eviscerate the protections of *Anders* and deprive petitioners of

the forceful appellate advocacy to which they are entitled, leaving only the cold record to speak in their behalf.

THERE IS NO REASON TO GRANT THE WRIT

A. The Petition Does Not Meet a Single Rule 10 Consideration

The state does not argue that this case meets a single one of the tests set forth in Supreme Court Rule 10, "considerations governing review on writ of certiorari." Nor could it: not a single one applies.

The first of these considerations, as outlined in the Rule, is whether a court of appeals has issued a decision that conflicts with the decision of another court of appeals. *See Yee v. City of Escondido*, 503 U.S. 519, 537-38, 112 S. Ct. 1522, 1534 (1992) (conflict between circuits "is, of course, a substantial reason for granting certiorari under this Court's Rule 10"). Here, there is clearly no such conflict.

The second consideration governing Supreme Court review is whether the appellate court has decided a federal question in a way that conflicts with the decision of a state court of last resort. That has not occurred in this case either. To the contrary: the Ninth Circuit's decision not only obeys *Anders*, but also cites approvingly both *Feggans*, *supra*, and *Wende*, *supra*. *See* Petition, Appendix A, at 8868-69.

The third consideration is whether the Court of Appeals."has so far departed from the accepted and ususal course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Supreme Court Rule 10. That has not occurred here either. The appellate court's decision is an altogether straightforward application of long-standing Supreme Court precedent.

The other considerations governing review of certiorari likewise have no application to this case. The Court of Appeals here has not decided an important question of federal law that should be settled by this Court; rather, it applies a thirty-two-year-old decision of this Court to precisely the type of factual setting that this Court intended. Nor has the appellate court decided a federal question in a way that conflicts with relevant decisions of this Court. Quite the reverse: the appellate court's decision follows this Court's long-standing precedent.

In sum, there is no reason for this Court to grant the state's petition. The state does not even argue that this case meets any of the requirements set forth in this Court's Rule 10. Nor does this case present any other unusual or compelling features that require this Court's intervention.

B. The Appellate Court Decision Does Not Invalidate California Procedure

The state's petition paints an alarming picture: if the appellate court's decision is permitted to stand, the administration of justice in the nation's most populous state will grind to a halt. Petition at 5, 7-8.

This appalling prospect is an utter fabrication. It completely ignores the restricted scope of the Ninth Circuit's decision. *Robbins v. Smith* does not take a battering ram to state procedure. It does not unilaterally sweep away decades of established methodology. It does not break an inch of new ground. All it says is that Lee Robbins' state-appointed appellate counsel did a bad job.

The decision in this case first discusses counsel's obligations under *Anders*. It then painstakingly reiterates that these obligations have also been recognized by the California Supreme Court. Using an extensive quotation from *People v. Wende*, *supra*, which lays out the *Anders* requirements, the decision points out that, under state law, appointed appellate counsel bear the same responsibility to their clients as do counsel in federal proceedings under *Anders*. Petition, Appendix A, at 8868. The appellate court then asked "whether [Robbins'

counsel] met his obligations . . . under *Anders* and its progeny." Petition, Appendix A, at 8869. In a fact-specific analysis, the court concluded that Robbins' attorney had not "complied with *Anders* and *Feggans*." Petition, Appendix A, at 8869.

This is not new law. This decision poses no threat to California courts or to the administration of justice in California. What the appellate court has done is simply to apply *Anders* and it progeny, including its California progeny, to Robbins' specific factual situation. Lee Robbins' appointed counsel filed a constitutionally deficient appellate brief in his behalf. The appellate court, like the district court before it, has recognized that the brief was unacceptable. There is no reason for this Court to intervene.

C. *Penson v. Ohio* was Properly Decided

In *Penson v. Ohio*, 488 U.S. 75, 79, 85, 109 S. Ct. 346, 349, 352 (1988), this Court held that the failure to comply with *Anders* is presumed prejudicial. The state had premised its argument in *Penson* upon *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2092 (1984), contending that counsel's *Anders* violations were immaterial because the state appellate court had expressly found that the petitioner had suffered no prejudice from them. In an opinion written by Justice Stevens and joined

by six other justices, including Justice Scalia and Justice Kennedy (Justice O'Connor concurred separately), the Court flatly rejected the state's argument. The failure to provide even the constitutionally mandated minimum level of advocacy required by *Anders*, the Court held, amounts to the constructive denial of counsel, rather than ineffective assistance of counsel.

The state now asks this Court to overturn *Penson*, and to require habeas petitioners with *Anders* claims to show under *Strickland* that they have been prejudiced by their counsels' failures. As the Court pointed out in *Penson*, however, to do so would insulate counsel's failure to comply with *Anders* and would gut *Anders* altogether. *Penson*, 488 U.S. at 86, 109 S. Ct. at 353. As the Court stated, "The primary difficulty with the State's argument is that it proves too much." *Id.* Requiring a showing of prejudice would render *Anders* unenforceable as long as the state appellate court independently reviewed the record: the defendant would not be prejudiced whether the appellate court reversed the conviction or determined that the appeal was meritless. 488 U.S. at 86, 88-89, 109 S. Ct. at 353, 354.

The regime proposed by the state – and rejected by eight Justices of this Court in *Penson* – "would leave indigent criminal appellants without any of the protections afforded by *Anders*."

Id. Thus, although the state does not address the issue, the consequences of its argument are plain: to overturn *Penson* is to overturn *Anders*. Doing so would wipe away more than thirty years of this Court's constitutional jurisprudence and would deprive indigent appellants of the vigorous advocacy to which they are entitled.[7]

D. <u>There is No Violation of *Teague v. Lane*</u>

The state's misconstruction of the scope of the appellate court's decision drives its argument under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). Under *Teague*, a petitioner generally may not seek the retroactive application of a new rule of constitutional law in a federal habeas proceeding if that rule was developed after the petitioner's state conviction became final. 489 U.S. at 299-310, 109 S. Ct. at 1069-75. This doctrine accords respect to state sovereignty and underscores the limited role of habeas corpus as a check on that sovereignty. 489 U.S. at 305-10, 109 S. Ct. at 1073-75.

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7. In an effort to describe the review accorded to Robbins' direct appeal, the state introduces material outside the record. Its assertion that the California Appellate Project/Los Angeles reviewed this case was not presented (either as argument or as admissible evidence) to either of the federal courts below. Robbins accordingly moves to strike footnote 3 and the first full sentence on page 16 of the state's petition.

The state contends that applying *Anders* to Robbins' case now -- and thus, it contends, invalidating *Feggans* and *Wende* -- somehow turns *Anders* into a new rule for *Teague v. Lane* purposes. Even if the state's odd *Teague* theory were correct, it would have no application here. The Ninth Circuit has not invalidated either *Feggans* or *Wende*. In fact, as discussed above, it has endorsed California's jurisprudence, holding that Robbins' state appellate counsel did not comply with the requirements of either *Anders* or *Feggans*. Petition, Appendix A, at 8869.

Moreover, the state's *Teague* theory is not correct. Robbins' conviction became final on October 21, 1992, when his state petition for review of his conviction was denied. CR 7, Ex. 4. *See Allen v. Hardy*, 478 U.S. 255, 258 n.1, 106 S. Ct. 2878, 2880 n.1 (1986) (per curiam) (finality defined). *Anders* had been decided twenty-five years earlier, in 1967. Thus, for Robbins, as for any petitioner whose conviction became final after 1967, *Anders* is not a new rule. Nothing in *Teague* prevents a petitioner from basing a habeas petition on constitutional safeguards that were announced before his or her conviction became final. Indeed, after *Teague*, that is the only basis available for habeas relief.

CONCLUSION

For the foregoing reasons, the state's petition for a writ of certiorari should be denied.

Dated: January 28, 1999

Respectfully submitted,

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*Counsel of Record for Respondent Lee Robbins

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1875 Century Park East, 23rd Floor, Los Angeles, California 90067-2561.

On January 28, 1999, I served the foregoing document described as **OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** on the interested party in this action by placing a true copy thereof in sealed envelopes and arranging for mailing same to the parties listed below:

Carol Frederick Jorstad, Esq.
Deputy Attorney General
300 South Spring Street, Suite 500
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in an office of a member of the bar of this Court at whose direction this service was made, and that I executed this document on January 28, 1999, at Los Angeles, California.

Kathy Coke